

THE HONORABLE JAMES L. ROBERT

**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

MICHAEL BOBOWSKI, ALYSON BURN,	)	<b>CLASS ACTION</b>
STEVEN COCKAYNE, BRIAN CRAWFORD,	)	
DAN DAZELL, ANGELO DENNINGS,	)	Case No. C10-1859-JLR
CHEYENNE FEGAN, SHARON FLOYD,	)	
GREGORY GUERRIER, JOHANNA	)	<b>OBJECTION TO PROPOSED</b>
KOSKINEN, ELENA MUNOZ-ALAZAZI	)	<b>CLASS SETTLEMENT AND</b>
TSANG, and KYLE WILLIAMS, on behalf of	)	<b>AWARD OF ATTORNEYS' FEES</b>
Themselves and all others similarly situated,	)	<b>AND EXPENSES</b>
	)	
Plaintiffs,	)	<b>NOTE ON MOTION CALENDAR:</b>
	)	Wednesday, December 19, 2012 at
v.	)	3:00 p.m.
	)	
CLEARWIRE CORPORATION,	)	
	)	
Defendant.	)	

Objector Gordon B. Morgan is a class member. His address is 4701 Ayers St., Ste. 105, Corpus Christi, Texas 78415; his phone is (281) 733-4097. A true and correct copy of his mailed notice is attached as Exhibit 1; a true and correct copy of his claim form is attached as Exhibit 2.

Objector Jeremy De La Garza is a class member. His address is 5334 Everhart, Suite 203, Corpus Christi, Texas 78411; his phone is (361) 688-2383. A true and correct copy of his mailed notice is attached as Exhibit 3; a true and correct copy of his claim for is attached as Exhibit 4.

1 This settlement is illusory and violates Rule 23 and Ninth Circuit precedent. The Court  
2 should reject it for three independent reasons. At a minimum, the fee request must be reduced.

3 First, the settlement is structured as a “claims made” settlement. Such settlements are  
4 designed to artificially deflate the payout by defendants and maximize the fees recovered by the  
5 class counsel. As any settlement administrator will testify, when a defendant requires parties to  
6 file claims, the claims rate will usually be in the one percent range. A \$10 check issued to a class  
7 member is not the same thing as the possibility that a class member will request a \$10 check, and  
8 should not be treated as of equal economic value, when the first procedure benefits the whole  
9 class and the latter procedure is likely to produce benefit to only 1% of the class. The parties are  
10 deliberately hiding from this court any disclosure of the amount the class will actually receive in  
11 the settlement; indeed, they violate Rule 23(h) by failing to disclose to the class the basis of their  
12 claim that the “percentage of the recovery” approach meets what they admit is the Ninth  
13 Circuit’s 25% benchmark. Docket No. 71 at 13-14. Moreover, they seek to hide this information  
14 from the court by scheduling the claims deadline after the fairness hearing. This violates *In re*  
15 *Bluetooth Prod. Liab. Litig.*: a district court must have before it the data to make “necessary  
16 calculations” to calculate the “benefit obtained for the class.” 654 F.3d 935, 945 (9th Cir. 2011).  
17 In reality, the class is likely to recover only about \$1 million, half of what the attorneys are  
18 recovering. As class action expert Ted Frank wrote on his blog,  
19  
20

21 But Clearwire won’t be systematically refunding its customers;  
22 class members have to fill out a claim form. Class members who  
23 are current customers will get credits on their account after filling  
24 out a claim form. Under some generous assumptions (say, 1.3  
25 million current customers with a 2% claims rate and an average  
26 claim of \$50 that gets entirely used, and 1 million former  
27 customers with a 0.5% claim rate and an average claim of \$50),  
Clearwire will settle for about \$3.25 million, and the attorneys will  
get 60% of that. It’s almost certain that class recovery will not

1 reach the \$6 million figure to justify a \$2 million fee under the  
2 Ninth Circuit's 25% benchmark rule.

3 See Ted Frank, "*Dennings v. Clearwire Corporation* class action settlement," Point of Law (Oct.  
4 17, 2012), available at [http://www.pointoflaw.com/archives/2012/10/dennings-v-clearwire-](http://www.pointoflaw.com/archives/2012/10/dennings-v-clearwire-corporation-class-action-settlement.php)  
5 [corporation-class-action-settlement.php](http://www.pointoflaw.com/archives/2012/10/dennings-v-clearwire-corporation-class-action-settlement.php). Indeed, the settlement is even worse than Frank  
6 indicates; any uncashed checks will revert to the defendant.

7 Second, the settlement has two of the three indicia of impermissible *Bluetooth* self-  
8 dealing. See *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935 (9th Cir. 2011);  
9 *McClintoc v. Lithia Motors, Inc.*, No. C11-859RAJ (W.D. Wash. Jan. 12, 2012). First, the fees  
10 are disproportionate to the relief the class will receive, a number that the parties are  
11 impermissibly hiding from the court and the class. Class counsel's lodestar claims are irrelevant:  
12 a lodestar is a ceiling, not a floor, and any lodestar must be justified by a cross-check against the  
13 percentage of recovery under *Bluetooth*: counsel's fee cannot "dwarf class recovery." 654 F.3d at  
14 945. Given that the class will likely collect far less than the \$6 million required to justify the \$2  
15 million requested, the result is disproportionate, unless the court reduces the fee award. See also  
16 *Dennis v. Kellogg* (9th Cir. Sep. 4, 2012). Secondly, the settlement contains a clear sailing  
17 provision without any offsetting relief to the class. Contrary to class counsel's claim, the issue in  
18 *Bluetooth* is not just collusion, but whether there is "a breach of fiduciary duty owed the class  
19 during settlement" because the class counsel "allowed pursuit of their own self-interests and that  
20 of certain class members to infect the negotiations" at the expense of their putative clients. *Id.* at  
21 946-47. Thus, contrary to class counsel's claims, merely satisfying the *Churchill* factors is  
22 insufficient to merit settlement approval. *Id.* at 946. We can add another sign of self-dealing not  
23 discussed by *Bluetooth*: class counsel negotiated for itself a "quickpay provision" that requires  
24 the defendant to pay class counsel before the class is entitled to a single dollar—perhaps as much  
25  
26  
27

1 as two years in advance. This alone merits a reduction in the fee request to compensate the class  
2 for the time value of money.

3 Third, the settlement impermissibly assigns \$2 million to the Milberg law firm for it to  
4 allocate among other law firms. Settlement § 4.02. It is illegal for a settlement to delegate the  
5 Rule 23(h) award in such a manner. *In re High Sulfur Content Gasoline Prod. Liab. Litig.*, 517  
6 F.3d 220 (5th Cir. 2008) (striking down such a delegation even when overseen by a court in an  
7 *ex parte* proceeding). Here, the settlement does not even provide the fig-leaf of the *ex parte*  
8 proceeding that *High Sulfur* deemed impermissible. If individual law firms have secretly agreed  
9 to accept less than the lodestar alleged to this court, that money should go to the class, rather to  
10 the law firm with the power to pull the strings.

12 Even if the settlement is approved, and the court decides to disregard the command of  
13 *Bluetooth* and *Dennis* that fees may not be disproportionate to the *recovery* of the class (as  
14 opposed to a hypothetical fictional possible recovery), the fees must be reduced. Class counsel is  
15 claiming an entitlement to a multiplier, but all of its precedent has been superseded by the  
16 Supreme Court's command in *Perdue v. Kenny A.*, 130 S. Ct. 1662 (2010), that multipliers are  
17 only appropriate in extraordinary circumstances.

19 Morgan and De La Garza reserve the right to have counsel appear at the fairness hearing,  
20 and to cross-examine any witnesses introduced in support of the settlement and fee request.  
21 Morgan and De La Garza join and adopt any other objections filed that are not inconsistent with  
22 this one.  
23  
24  
25  
26  
27

1 Dated this 30<sup>th</sup> day of November, 2012.

2 By: s/ Donald W. Heyrich

3 Donald H. Heyrich, WSBA No. 23091

4 **HEYRICH KALISH MCGUIGAN PLLC**

5 1325 Fourth Avenue, Suite 540

6 Seattle, WA 98101

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10 /s/ Christopher A. Bandas

11 Christopher A. Bandas (*Pro Hac Vice Pending*)

12 Texas State Bar No. 00787637

13 BANDAS LAW FIRM, P.C.

14 500 North Shoreline, Suite 1020

15 Corpus Christi, Texas 78401-0353

16 Telephone (361) 698-5200

17 Facsimile (361) 698-5222

18 *ATTORNEYS FOR APPELLANTS*

19 *GORDON B. MORGAN AND*

20 *JEREMY DE LA GARZA*

**PROOF OF SERVICE**

I certify that a true and correct copy of the foregoing document has been forwarded to all counsel via CM-ECF filing on this the 30th day of November 2012.

Clifford A. Cantor (*Also sent via First Class Mail, postage pre-paid*)  
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Seattle, WA 98101-3045

*Attorneys for Clearwire Corporation*

s/ Heidi M. Powell  
Heidi M. Powell, Paralegal

# **EXHIBIT 1**

**Clearwire customers: If you paid for retail services from Clearwire Corp. between Nov. 14, 2004, and Feb. 27, 2012, you could be entitled to benefits under a class action settlement.**

***THIS NOTICE MAY AFFECT YOUR LEGAL RIGHTS. PLEASE READ IT CAREFULLY.***

This is an official court notice from the United States District Court for the Western District of Washington at Seattle.  
*Dennings v. Clearwire,*  
No. 2:10-cv-01859-JLR

**Clearwire Litigation**  
Settlement Administrator  
c/o GCG  
P.O. Box 9910  
Dublin, OH 43017-5810

Presorted  
First Class Mail  
U.S. Postage  
**PAID**  
S. Hackensack, N.J.  
Permit No. 1450

CLW0236497377



Claim No: CLW03997930

Control No: 0253642490

\*\*\*\*\*AUTO\*\*SCH 5-DIGIT 78415

GORDON MORGAN

4701 AYERS ST

STE 105

CRP CHRISTI TX 78415-1420



This notifies you of a proposed settlement of three class actions against Clearwire.

Clearwire's records show you are a member of the Plaintiff Settlement Class. Plaintiffs claim Clearwire misrepresented its Internet service speeds by failing to disclose it might restrict its customers' Internet speeds and that Clearwire provided poor Internet and phone service, engaged in misleading advertising, and imposed early termination fees ("ETFs") that prevented customers from terminating because of poor service. *Clearwire denies any wrongdoing and has asserted many defenses.* In agreeing to settle, Clearwire does not admit any wrongdoing.

As part of the proposed settlement, Clearwire will provide payments or credits to Class Members who submit a valid Claim Form. For details on the calculation of the dollar amounts of these payments/credits, go to [www.DenningsSettlement.com](http://www.DenningsSettlement.com). Clearwire will also enhance disclosures about network management policies and change its ETF collection policies.

***TO RECEIVE A PAYMENT UNDER THE SETTLEMENT, YOU MUST SUBMIT A CLAIM FORM BY January 9, 2013.***

If you want to exclude yourself from this Settlement, you must send a written request specifically stating that you request exclusion to *Clearwire Litigation* Settlement Administrator, c/o GCG, P.O. Box 9910, Dublin, OH 43017-5810 postmarked *no later than November 30, 2012.*

If you remain a Class Member, you may object to the Settlement by writing to the Court and sending copies to Counsel no later than **November 30, 2012**. Full details on how to object or exclude yourself can be found at [www.DenningsSettlement.com](http://www.DenningsSettlement.com).

The Court will hold a hearing on **December 19, 2012**, at 3:00 p.m. to consider whether to approve the Settlement and award attorneys' fees and expenses as requested, in an amount not to exceed \$2 million. You or your lawyer may ask to appear and speak at your own expense, but you don't have to. The full text of the Long-form Notice and a downloadable Claim Form are available at [www.DenningsSettlement.com](http://www.DenningsSettlement.com). The website also explains the Settlement terms in more detail. Call 1-888-277-8960 or write to *Clearwire Litigation* Settlement Administrator, c/o GCG, P.O. Box 9910, Dublin, OH 43017-5810 to request the Long-form Notice and Claim Form. This Notice is only a summary.



## **EXHIBIT 2**

## Dennings v. Clearwire Corporation

Thank you. Your claim has been successfully submitted. Please retain this confirmation for your records.

Claim #: 3997930  
Control #: 0253642490

Dated: 2012-11-30 13:23:38

[Print]

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CMH-IIS1

EXHIBIT 2

## **EXHIBIT 3**

From: [denningssettlement@tgcginc.com](mailto:denningssettlement@tgcginc.com)

Date: September 21, 2012, 5:13:31 AM CDT

To: [jdremax@me.com](mailto:jdremax@me.com)

Subject: **Dennings v. Clearwire Corporation Case No: 2:10-cv-01859-JLR - Notice of Proposed Class Action Settlement**

Reply-To: [denningssettlementDoNotReply@tgcginc.com](mailto:denningssettlementDoNotReply@tgcginc.com)

**Clearwire customers: If you paid for retail services from Clearwire Corp. between Nov. 14, 2004, and Feb. 27, 2012, you could be entitled to benefits under a class action settlement.**

***THIS NOTICE MAY AFFECT YOUR LEGAL RIGHTS. PLEASE READ IT CAREFULLY.***

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*Dennings v. Clearwire*, No. 2:10-cv-01859-JLR

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Clearwire's records show you are a member of the Plaintiff Settlement Class. Plaintiffs claim Clearwire misrepresented its Internet service speeds by failing to disclose it might restrict its customers' Internet speeds and that Clearwire provided poor Internet and phone service, engaged in misleading advertising, and imposed early termination fees ("ETFs") that prevented customers from terminating because of poor service. ***Clearwire denies any wrongdoing and has asserted many defenses.*** In agreeing to settle, Clearwire does not admit any wrongdoing.

As part of the proposed settlement, Clearwire will provide payments or credits to Class Members who submit a valid Claim Form. For details on the calculation of the dollar amounts of these payments/credits, go to [www.DenningsSettlement.com](http://www.DenningsSettlement.com). Clearwire will also enhance disclosures about network management policies and change its ETF collection policies.

***TO RECEIVE A PAYMENT UNDER THE SETTLEMENT, YOU MUST SUBMIT A CLAIM FORM BY JANUARY 9, 2013 (<https://secure.gcginc.com/clw/logon.aspx>).***

***Your claim and control numbers for filing a claim online are 4101458 and 0050451040, respectively.***

If you want to exclude yourself from this Settlement, you must send a written request specifically stating that you request exclusion to *Clearwire Litigation Settlement*

Administrator, c/o GCG, P.O. Box 9910, Dublin, OH, 43017-5810 postmarked ***no later than November 30, 2012.***

If you remain a Class Member, you may object to the Settlement by writing to the Court and sending copies to Counsel no later than **November 30, 2012**. Full details on how to object or exclude yourself can be found at **[www.DenningsSettlement.com](http://www.DenningsSettlement.com)**.

The Court will hold a hearing on **December 19, 2012**, at **3:00 p.m.** to consider whether to approve the Settlement and award attorneys' fees and expenses as requested, in an amount not to exceed \$2 million. You or your lawyer may ask to appear and speak at your own expense, but you don't have to. The full text of the Long-form Notice and a downloadable Claim Form are available at **[www.DenningsSettlement.com](http://www.DenningsSettlement.com)**. The website also explains the Settlement terms in more detail. Call (1-888-277-8960) or write to *Clearwire Litigation* Settlement Administrator, c/o GCG, P.O. Box 9910, Dublin, OH, 43017-5810 to request the Long-form Notice and Claim Form. This Notice is only a summary.

Your claim number is: 4101458  
Your control number is: 0050451040

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United States District Court for the Western District of Washington at Seattle has ordered this email to be sent. If you wish to UNSUBSCRIBE from future email messages from the Settlement Administrator with regard to this Settlement, please click on this [link](#).

## **EXHIBIT 4**

11/30/12 10:02 AM

<b>Dennings v. Clearwire Corporation</b>
Thank you. Your claim has been successfully submitted. Please retain this confirmation for your records.
Claim #: 4101458 Control #: 0050451040 Dated: 2012-11-30 11:01:30
<a href="#">Print</a>
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<https://secure.gig.or.com/cwa/PrintWindow.aspx>

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